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The Chief Justice

By JUDGE HAROLD M. STEPHENS
Associate Justice, United States Court of Appeals, Washington, D. C.

Condensed from American Bar Association Journal, July, 1946

FREDERICK MOORE VINSON was born January 22, 1890, at Louisa, Lawrence County, Kentucky, the son of James and Virginia (Ferguson) Vinson. His ancestors, who had pioneered their way to eastern Kentucky in 1800, were of Irish, English and French stock. Among them there were farmers, timbermen, merchants, bankers, doctors and lawyers. The future Chief Justice was educated in the common schools and at the Kentucky Normal College, where he graduated in 1908. He pursued further studies at Center College, Kentucky, receiving a bachelor of arts degree in 1909, and in 1911 was graduated in law. Young Vinson played baseball and football during school and college days, in part supported himself by working in the college library and as a student instructor in mathematics. Notwithstanding these diversions he completed his studies in both arts and law with high honors.

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Chief Justice Vinson

Vinson commenced law practice in Louisa in 1911 and continued until 1923, serving in 1913 as City Attorney and from 1921–1923 as Commonwealth Attorney for the Thirty-second Judicial District of Kentucky. He was then elected to Congress and served there, variously representing the Eighth and Ninth

Kentucky Districts and the state at large, until 1938 with the exception of the years 1929–1931 when he again practiced law, at Ashland, Kentucky, as well as at Louisa. Congressman Vinson was a member of the Ways and Means Committee and chairman of the sub-committee on Internal Revenue Taxation. From 1932–1938 he steered through the House every revenue act. On May 12, 1938, the Congressman became a judge, taking his oath on that date as Associate Justice of the United States Court of Appeals for the District of Columbia. He served in that capacity until May 27, 1943. During some fourteen months of that period, from March 2, 1942, to May 27, 1943, he served also, under appointment of Chief Justice Stone, as chief judge of the United States Emergency Court of Appeals created by Congress to review orders of the Office of Price Administration. On the date last mentioned, at the urgent request of President Roosevelt he resigned his judicial posts to accept the position of Director of the Office of Economic Stabilization. He held that office until March 5, 1945, when he was transferred by the President to the post of Federal Loan Administrator in charge of the Reconstruction Finance Corporation and its subsidiaries. On April 2 of the same year he was appointed War Mobilization Director vice Mr. Byrnes and on July 16, following, was appointed by President Truman Secretary of the Treasury. In each of the three positions last mentioned his confirmation by the Senate was unanimous.

Current accounts of the Chief Justice's career, and the foregoing silhouette, tend to emphasize, especially because of the national importance of the positions he held commencing with his appointment as Director of the Office of Economic Stabilization, his spectacular success in politics. But of greater interest to the legal profession is the fact that of the thirty-five years between his admission to the Bar in Louisa in 1911 and his appointment as Chief Justice of the United States in 1946, he spent more than half, nineteen years to be exact, in intensive and varied legal work—fourteen years in the practice of law at Louisa and Ashland, Kentucky, and five years as a judge of the United States Court of Appeals for the District of Columbia, including concurrent service of some fourteen months on the United States Emergency Court of Appeals. At the time of his early practice in Louisa, that town was a community of some fifteen hundred inhabitants, but it was the county seat on the Kentucky-West Virginia border; and Ashland, in Boyd County, where he practiced later, was a thriving country town of some twenty thousand in population.

In these two localities Vinson's practice was of a general character. As is customary in such communities, where a lawyer's staff is not large, he himself drew the varied legal instruments requisite in a busy country practice, wrote briefs and tried and argued cases. His practice included criminal cases both for the defense, and, as Commonwealth Attorney, for the prosecution. On the civil side he represented railroads, insurance and coal companies, banks and receiverships. Much of his work involved oil leases, and there was, in addition, conveyancing and probate work and cases in contract and tort. Besides his strictly professional activities, he engaged in private business as a director in banking, wholesale grocery and milling enterprises. All of this developed professional and business skill, versatility and independence of judgment.

On the United States Court of Appeals for the District of Columbia, Judge Vinson found himself engaged in judicial work involving a great variety of important cases of both national and local character.

In the course of his five years of service on the court Judge Vinson wrote 117 majority opinions and participated in some 333 additional opinions written by other members. These opinions ranged the gamut of the Federal and local jurisdiction of the court. In addition Judge Vinson wrote one separate concurring opinion, joined in writing one concurring opinion, and in one case concurred in the result without opinion. He wrote two separate opinions concurring in part and dissenting in part, and five dissenting opinions; in one case he dissented without opinion. His own opinions in cases on the Federal side of the court involved, among others, mandamus and injunction suits against various officers of the Federal government, patent and trademark cases, taxation, war risk insurance, condemnation of lands, bankruptcy, Selective Service, carriers, and review of orders of the Railroad Retirement Board, the National Mediation Board, the Federal Communications Commission, and the Wage and Hour Division of the Department of Labor. In cases on the local side Judge Vinson dealt with such subjects as wills, real estate brokerage, injunctions, negligence, trust deeds, process, insurance, murder, rape, wrongful death, workmen's compensation, garnishment, adoption, divorce, annulment of marriage, probate, partnership, specific performance of contracts, banking and habeas corpus. In twenty-five cases in which Judge Vinson wrote majority opinions petitions for writs of certiorari were filed in the Supreme Court. The petitions were denied in all but four. In respect of the lat-

ter there was reversal in three and an affirmance in one. In one of the cases in which he wrote a concurring opinion, writ of certiorari was granted by the Supreme Court and there was an affirmance. In the six cases in which he dissented petitions for writs of certiorari were filed in two, but the petitions were denied. During his service on the United States Emergency Court of Appeals Judge Vinson wrote majority opinions in four cases and one dissent. In respect of the former, petitions for writs of certiorari were filed in two only and both petitions were denied. In the case in which he dissented the majority was reversed by the Supreme Court, that tribunal sustaining the view expressed by Judge Vinson in his dissent.

Judge Vinson's style of judicial writing is plain and unadorned. His opinions are unpretentious and written without self-consciousness. He states the facts of his cases and the pertinent authority and the results which in his view are demanded by application of principles to the facts. His dissents are written frankly and vigorously but without trace of acerbity or ill will towards his colleagues.

The Chief Justice is a sincere and kindly man. He is free from personal or intellectual arrogance. While properly confident of his own powers, he is open minded toward the views of others. In his personal relationships he is amiable, although somewhat reserved. While his political success might seem to indicate otherwise, he has not been in any undue sense self-seeking or ambitious. He has enjoyed his political service, but has accepted it rather as a duty than as an end, always preferring the law as a career. While he has a native shrewdness, he is not covert; on the contrary he is open and trustworthy in his dealings. He is a loyal friend. He is deliberate and considerate in reaching conclusions and is not to be swerved from a course he thinks right. He is optimistic and affirmative by nature. In his own words, he believes that "He who lights a candle is better than he who curses the darkness."

The Chief Justice was married in 1923 to Roberta Dixon of Kentucky. They have two children, Frederick Moore and James Robert, the latter a senior in the Woodrow Wilson High School in Washington, the former, recently a command gunner on a B–29 in the Army Air Forces, now a student at Washington and Lee University. The Chief Justice is a member of the American, Boyd County (Kentucky), and Kentucky State Bar Associations, and of the Masonic Order and of the Elks. He is a member of the Phi Delta Theta and Phi Beta Kappa (honorary) fraternities and of the Methodist Church. He holds

honorary degrees of doctor of laws from Center College (1938) and the University of Kentucky (1944).

When on the portico of the White House he took the oath to "administer justice without respect to persons, and to do equal right to the poor and to the rich" and to "support and defend the Constitution of the United States" and "bear true faith and allegiance to the same," the Chief Justice pronounced with simple fervor and humility the final words, "So help me God." The Bar and the people of the country may confidently look to the Chief Justice for wise and honest discharge of the duties of his high office.

It Pays to Be Ignorant

Patrick Dugan, illiterate but enterprising, obtained a job as sexton and was doing quite well in his new position until there was a burial in his churchyard and he was asked to sign the certificate. Pat admitted reluctantly that he could not write and was discharged.

The unemployed man scratched around and found a few small carpentry jobs and then, as the years went by, he was able to build up a large and prosperous contracting business. Wealth and position became his.

One day Pat needed $75,000 for a new development and went to the bank to borrow it.

"You can have the money, Mr. Dugan," the banker told him. "Just sign these notes."

"Oi can't write," said Pat.

"Can't write?" exclaimed the banker. "And yet you have become one of the most wealthy and influential men in this community. What would you have been today if you could write?"

"A sexton making $50 a month," replied the clever Irishman.

Dawes, Pawes, Cawes

When a crow woke a lawyer named Dawes
By screaming outside without pawes,
The attorney got sore,
Stuck his head out the door,
And yelled, "You and your proximate cawes!"

Contributed by: A. Swarthout, Rochester, New York.

Rhapsody of a Surveyor

Attorney Donald J. Warner of Salisbury, Connecticut, contributes these two descriptions of real estate found among the papers of William E. Pettee, a Civil Engineer, at Salisbury.

ALL that lovely & beautiful combination of Land Rocks & Water with The vegetation & other sinecures therewith naturally appertaining being greatly known & admired amongst the family of the party of the 1st part—their servants and neighbors by the peculiar appelation & romantic name of "The Old Skunk Cabbage Lot" the same being situated in the western part of the noble town of Pittsfield in that distinguished County of Berkshire & in the highly honored state of Massachusetts & other ways referred to as being & lying in Oblong, Rectangular, Parallelogram & all sort of figure or form & more in particularly described as follows "to wit"

Southerly by that certain High—By or some other kind of a Way more or less used for Public or Private affairs either by accident, design or otherwise as parties & others may go in passing between some parts of Pittsfield toward Lebanon—

Northerly by a line supposed to be opposite the foregoing being at present along an antiquated & very dilapidated fence

Easterly by more or less of another venerable fence which also has always been very much out of repair

Westerly by that certain piece —plot—parcel or portion of some kind of Real Estate whereon now or formerly we are informed once dwelt a certain individual either as tenant or owner thereof known by the name of Old Uncle Joshua ——— who was remembered as the Grand Architect or Naval constructor of Splint Brooms & Cattle Physic—

These premises hereby conveyed are said to be about 97 Rods long somewheres & the width of which varies but likely includes from 4 to 10 acres such as it is—

Reserving however for the benefit of myself & my heirs forever as follows—

1st the Right & Priviledge at all times of refusing to pay any more taxes thereon—

2d the Right & Priviledge of going upon over & across the same at all times—

3d the Right & Priviledge of passing & repassing in that certain Way adjoining said premises—

4th the Right & Priviledge at all times of calling upon my friends & neighbors thereabouts—

5th Also the Right & Priviledge of enjoying any lawful business or pleasure—

6th Also the Right & Priviledge at all times of making remarks regarding this transaction—

7th Also the Right & Priviledge at all times to appeal to Congress for any special priviledge—

8th Also the Right & Priviledge at all times to anything else which will not invalidate this Instrument

SECOND DESCRIPTION

147 Acres 3 Roods & 19 Rods in quantity with enough more to make up for all swamps & Ledges therein contained & all other lands of little or no value which we value in sizing up at 25¢ per acre to be worth $36.87.

Based about as follows—

Commencing at a certain stump of alders about a stones throw from a bend in the brook running through the Great Swamp so called—Thence by a certain straight line to a marked Birch tree & stones about 2 or 3 times as far from a Ledge

Thence crooking around said Ledge to a marked Beech tree & stones in line of the Kings lot—Thence in line of said Lot to a certain Brush fence & thence along said fence & extending therefrom to a stake & Stone Bounds near a pile of Hemlock Bark—Thence by a certain straight line out to the Horn so called & passing around the same as far as to the Great Bend so called & from thence a straight line out to a ½ turn in another Brush fence & so on to 3 White Oak Staddles with stones between them—Thence in a course diagonally Parallel with Fox Hollow Run so called to a certain marked Red Cedar tree & stones on the off side of a certain small Knoll—Thence by another certain straight line out to a heap of stones which is by pacing just 18 Rods from a rotten Hemlock Tree on the side hill where Fid. Blake trapped a bear—Thence to the Bounds begun at after having it run (?) it by some competent surveyor so as to include the acres & areas as hereinbefore called for—

CLARENCE DARROW

By R. D. C. Howell
Judge, Court of Appeals of Tennessee

Condensed from
Tennessee Law Review, June, 1946

Clarence Seward Darrow was born at Farmdale, Ohio, on April 18, 1857. When Clarence was seven years old his father bought a house in Kinsman, Ohio. This was his home until he was twenty-one years of age.

At sixteen years of age he was sent to Allegheny College, which his father had attended. At the end of his freshman year he returned to Kinsman. In the following fall, he obtained a job as a teacher in the district school at Vernon, Ohio, about three miles from Kinsman.

After a year of teaching the eighteen year old boy found his interest turning more and more to law. He saw now that he enjoyed conflict and the clash of mind against mind in the fight for what each conceived to be the right and the truth. When he was twenty years old and had been teaching for three years, he had all the prerequisites of a lawyer. He liked books, he had a natural fluency of speech, and he was able to think clearly and to the point. He went to the Law College at Ann Arbor, Michigan, and spent one quiet year, making few friends while there. He liked to study alone and to come to his own conclusions. He did not return to Ann Arbor for the second year but found a job in a law office in Youngstown, twenty miles from his home.

A few weeks after his twenty-first birthday he presented himself to a committee of lawyers who were chosen to examine applicants for admission to the bar. He passed the examination and was admitted to practice. Shortly thereafter he went to Andover, Ohio, where he began the practice of law. He stayed there about one year and then moved to Ashtabula, Ohio, a town of about 5,000 inhabitants. After a short stay there, he was persuaded by his brother Everett to go to Chicago.

When Darrow had been in Chicago about two years, he received a note from Mayor Cregier asking him to call at his office. He was offered the position of special assessment attorney for the city at a salary of three thousand dollars a year. He accepted. About three months later the assistant corporation counsel of the city got into a political

row and was forced to resign. Darrow was given his job and a salary of five thousand dollars a year. In this position he had his first experience with court procedure. After only ten months as assistant, he was promoted to the position of Corporation Counsel for the City of Chicago. It was here that Darrow first crossed swords with his future opponents: the railroads and prohibition.

After four years with the city legal department, he accepted a position with the Chicago & Northwestern Railway in its legal department. While holding this connection with the railway he continued to read, lecture and debate, making friends with socialists, labor leaders, anarchists, skeptics, free-thinkers of all breeds, serving the railroad with his right hand and the liberals with his left. Then the workers of the Pullman Palace Car Company struck; the American Railway Union went out in sympathy with them and the injunction issued, for defiance of which Eugene Debs was sent to jail.

The Pullman Company was building Pullman cars in its shops. The workers of the company were required to occupy houses belonging to the company at excessive rents and to purchase their supplies at the company stores at prices much above those asked elsewhere. These houses were poorly equipped and unsanitary, and all repairs were made at the expense of the renters. If an employee joined a union he was promptly fired, his family was put out of the house, and his name was entered on the black-list and sent to every railroad in the country. Any attempt by an employee to discuss the matter, to protest against or better any existing condition brought immediate dismissal. Then the Pullman workers struck. Mayor Hopkins of Chicago investigated conditions at the Pullman shops and announced that his sympathies were with the strikers. Darrow resigned his position with the railroad company and undertook to defend Eugene Debs who had been indicted for criminal conspiracy.

While the Debs trial was in progress in January 1895, Darrow had a subpoena issued for George Pullman as a witness, but he could not be found. He had fled. The next morning one of the jurors was reported ill and Judge Grosscup, who was presiding at the trial, continued the case until the following May. The trial was not resumed. Debs and some of his associates were cited for contempt in having refused to obey an injunction issued by a Chicago District Court. Upon this trial the defendants were found guilty and sentenced to six months in jail. The case was appealed to the United States Supreme Court and there the lower courts were affirmed.

Darrow would have been considered only as an eccentric lawyer, little known outside of the State of Illinois, had not a crisis developed in the form of the controversies between capital and labor. When he was employed by John Mitchell, president of the United Mine Workers of America, to lead the anthracite coal miners' fight for existence, this fact was announced calmly at the end of a long newspaper column. But by the time the hearing before President Theodore Roosevelt's Commission was in full swing the name of Clarence Darrow was emblazoned in headlines across the continent and America had a new idol to worship or at whom to fling abuse.

Darrow was very much pleased with the invitation to take charge of the miners' case in what seemed to have been at that time a great crisis in American history. This is the first time that the workers of an entire industry had combined to strike. It was the first time that individual unions called for mass co-operation in fighting for their own salvation. It was the first strike in which the entire public participated. The strike was called in May 1902 and by October industry was verging upon a collapse and railroad schedules had been cut to a minimum. It seems, however, that in spite of the imminent prospect of a heatless winter, the public was almost solidly in sympathy with the coal miners.

George Baer, head of the coal mine operators, refused to arbitrate, declaring that they had nothing to arbitrate. He said: "God in his wisdom has put the control of business into the hands of Christian gentlemen."

Darrow undertook to demonstrate that a raise in wages would have made but a slight diminution of profits earned year after year, a diminution which would have been offset by stronger, healthier, happier and hence more loyal working forces; a secure, healthy labor force must necessarily build a more prosperous nation but the coal operators did not seem to be interested in the welfare of the nation. Their job was to get out

as much coal as they could at the lowest possible cost to them and then sell it at the highest possible price.

As a final result of this hearing on Saturday, March 21, 1903, the awards of the commission were published. All contract miners were given a ten per cent raise. Although the commission put no restrictions upon the company stores and although it criticised the union severely for acts of violence on the part of its members and failed to concede that the rate of pay was so low that miners' children were forced into the mines at early ages, the decision was almost a solid victory for the United Mine Workers.

Darrow's next big case was the defense of John J. McNamara, Secretary of the International Bridge and Structural Iron Works, and his brother James B. McNamara, who had been arrested, charged with the dynamiting of the Los Angeles Times Building. In April 1911 James B. McNamara and Ortie McManigal were arrested in Detroit on charges of safeblowing, and were removed without warrants to Chicago, where they were held as captives in the house of a police sergeant until extradition papers could arrive from Los Angeles. After being held incommunicado for some time, McManigal confessed to numerous dynamitings and implicated the McNamaras.

Upon the insistence of Gompers, Darrow finally agreed to accept employment. He felt that he had to accept the case or be called a traitor to unionism. He went to Los Angeles and to the county jail to interview the defendants. Both of the McNamaras declared their absolute innocence of the crime charged.

When Darrow walked into Judge Bordwell's court on October 11, 1911, to begin his defense, union sympathizers the world over gazed lovingly at his picture, assured each other that he would get the boys off, that he would expose the frame-up, that he would win another great victory for labor and the common people. But Clarence Darrow walked into the courtroom

a beaten man. He had learned that the McNamaras were guilty as charged.

The testimony against the McNamaras was most convincing. So helpless did the case look to the defense that it was suggested that a settlement be made. The prosecution and the Judge agreed that should the defendants change their pleas to "Guilty," a prison sentence would be imposed. This was carried out. Darrow had lost and was being blamed for a most disastrous day for the labor unions.

Later Darrow was arrested and charged with bribery of prospective jurors. On his trial Bert Franklin, his hired man, testified that Darrow knew nothing about the jury bribery, and he was acquitted.

The Scopes Evolution Case at Dayton, Tennessee, did not spring up unexpectedly.

Bryan had said, "This trial involving the constitutionality of the Tennessee Anti-Evolution Act of 1925 uncovers an attack for a generation on revealed religion. A successful attack would destroy the Bible and with it revealed religion. If evolution wins Christianity goes." Darrow replied, "Scopes isn't on trial; civilization is on trial. The prosecution is opening the doors for a reign of bigotry equal to anything in the middle ages. No man's belief will be safe if they win."

It was an old Darrow stratagem of putting the prosecution on the defense, which not only kept the hearing alive but turned the tide to victory. Since the court would not permit him to put scientific witnesses on the stand to build up evolution and the defense of his client, the only recourse he had left was to put the prosecution on the stand and try to break down the literal interpretation of the Bible. He asked William Jennings Bryan if he would be willing to go on the stand to testify as an expert on the Bible. Bryan assented most happily, and the Scopes monkey trial took on another dimension, providing the American people with what the New York Times described as the most amazing court scene in Anglo-Saxon history.

Darrow then cross-examined Bryan at length and the general opinion was that as a result Bryan had taken an awful licking: that the Bible had not suffered, but Bryan had.

Darrow asked that the jury agree on a verdict of guilty in order that the case might be appealed to the Supreme Court of Tennessee. This was done and Scopes was fined one hundred dollars by the Judge. Darrow left Dayton and went to the Smoky Mountains for a rest. Bryan remained in Dayton and on the following Sunday, a very hot day, he lay down for a rest after dinner and died in his sleep.

The case was argued at the December 1926 term of the Su-

preme Court and in an opinion by Chief Justice Green, concurred in by a majority of the Court the law was held to be constitutional.

Thus the monkey case ended.

Darrow was counsel in many other interesting and important cases, wrote articles for newspapers and magazines and delivered many lectures.

When he was seventy-nine years old he wrote an article for Esquire on selecting jurors. He started by saying that you should always choose as a juror a man who laughs, because a juror who laughs hates to find anyone guilty, and to avoid wealthy men, because the rich men will always convict, unless the defendant allegedly had violated the anti-trust laws, he then dissected the influence of the various religions upon the character of the prospective juror. He advised that Methodists be accepted as jurymen because "their religious emotions can be transmuted into love and charity," but warned against Presbyterians because "they know right from wrong but seldom find anything right," and against Lutherans because "they were almost always sure to convict." After counseling that one should never accept a prohibitionist under any circumstance, he recommended that the best jurors for the defense were Catholics, Unitarians, Congregationalists, Universalists, Jews, and agnostics.

The last words he was to write, which were found in his desk, scribbled in longhand on composition-book paper, were an epitome of his life. "The fact that my father was a heretic always put him on the defensive, and we children thought it was only right and loyal that we should defend his cause. Even in our little shop the neighbors learned that there was something going on, and that my father was ever ready to meet all comers on the mysteries of life and death. During my youth I always listened, but my moral support was with my father. I cannot remember that I ever had any doubt that he was right. The fact that most of the community were on the other side made him so much surer of his cause."

Darrow was sick for about one year, and died on March 13, 1938. He had asked that his friend, Judge Holly, speak at his funeral saying, "He knows everything there is to know about me, and has sense enough not to tell it."

"Evil men are rarely given power; they take it over from better men to whom it had been entrusted." By Justices Roberts, Frankfurter, and Jackson, dissenting, in Screws v. United States, 89 L. ed. 1495, 323 U. S., 65 S. Ct. 1031.

When Humor Lights the Law

From the Liberty (Mo.) Tribune

FRANCIS G. HALE, Liberty, Missouri attorney, with an unsurpassed intellectual humor, provides a welcome relief from the monotony of staid law terms employed tautologically in most courtrooms. An amazing vocabulary enables him to express simple facts in a manner scarcely intelligible to an average layman. His philosophy of the law business is that the injection of humor does not remove the sobriety of judicial proceedings; and at the same time, a serious lawsuit need not remove man's prerogative for a good laugh, so long as it is not at the expense of any individual.

A recent instance of Hale's genius is found in a divorce petition. The defendant in the case came to him and demanded to know just what he was being charged with. The lawyer was obliged to translate the petition to the language of the commoner. The particular portion which had most puzzled the defendant was the clause, "subsequent to said marriage, in due course of nature and in compliance with the scriptural adjuration in Genesis 1:22 she (the plaintiff) became enciente and so informed defendant."

Another recent divorce petition filed in a circuit court contained the following clauses:

". . . shortly after the marriage aforesaid, and repeatedly during the cohabitation following the same, defendant advised plaintiff, to his mortification and embarrassment, that he was of an advanced age and too old for her girlish, frisky, coltish and youthful spirits, and that she had made a great mistake in intermarrying with plaintiff;

"That she had made a considerable, if not irretrievable mistake in the marriage aforesaid; that she cared nothing for plaintiff, and that under the circumstances aforesaid, she could not possible hereafter do so, with all of which plaintiff is forced reluctantly to admit, all to his mortification, embarrassment and humiliation." The couple had lived together approximately three weeks.

Last summer Hale sustained

a broken arm when a filing case fell on him in his law office over the First National Bank. The following article from the lawyers' magazine, "Case and Comment" shows how he made use of the incident to employ his rare wit:

Fate Caught Up

"Attorney Francis G. Hale of Liberty, Mo., stated to the court that unless he broke a leg the case would be tried on the date set for trial. The following allegations from his application for continuance show how fate caught up with him:

"That on the evening of August 30, 1945, defendant's said attorney inadvertently ran afoul of the forces of gravity, as a result of which the midsection of his left humerus was brought into contact with a stationary sharp-edged object, with such force and violence as to then and there produce a complete oblique fracture of said part of said bone;

That immediately adjacent to the point of said fracture were certain bodily tissues, including sensory nerves and alleged muscles, both of which were lacerated, contused and bruised and resulted in producing in the mind of defendant's said attorney persistent illusions of discomfort and pain;

That since said date said attorney has been under the care and custody of a battery of

physicians, surgeons, internes, nurses, wife and neighbors, and has been unable to devote his undivided attention to preparation of defense of this action;

That he has twice submitted his said member to the kneading administrations of an orthopedist, is now threatened with the necessity of an open reduction of said fracture, and is harnessed up like unto a circus horse, as will more fully appear from Exhibits A and B hereto attached and made a part hereof;

Wherefore, defendant prays the court that the trial of this cause be continued for the reasons aforesaid."—Contributed by Attorney Ike Skelton, Lexington.

"I'm weary of this life of crime! Guess I'll get me a good lawyer and plead guilty!"

As Jurors See a Lawsuit

Answers to a Questionnaire

By JUDGE DAVID W. MOFFAT
Late Justice Utah Supreme Court

Condensed from Oregon Law Review, April, 1945

A SERIES of twenty questions were sent to over fifteen hundred jurors. The following is an outline of the question and their answers.

(1) The question "Did you find your service as juror interesting?" was intended as an easy preliminary approach. It was almost unanimously answered "yes."

(2) To the question "Did you serve willingly?" the answers were nearly unanimously in the affirmative; however, there were three times as many negative answers as to the first question. Those few who had not served willingly thought that the compensation was insufficient, that the call to jury duty came at the wrong time, or that others who needed the pay should have been called.

(3) "Did you sense that your duties were weighted with the responsibility of arriving at justice between the parties?" This question was given more affirmative answers than any other question. One juror commented that the whole procedure was so machinelike that no *feeling* was necessary. He was probably making a "smart" answer.

(4) To the question "Did you feel that you were in a friendly atmosphere?" the critical answers increased materially. The great majority felt a friendly atmosphere. Those who criticized thought the court was stilted.

(5) "Did the judge show an attitude of being desirous of helping you perform your duty?" The "no" votes to this question were negligible. The answers show that trial judges are well thought of by jurymen. Recognizing human frailties and the rightness of and frequency of difference of opinion, one could not hope for a better endorsement.

(6) On the question "Did the attitude of the judge tend to affect your verdict?" the answers

were reversed. Only a small percentage answered "yes." Generally those who said they were influenced qualified their answer by saying that any personality has its influence. Such influence as they were conscious of they thought tended to make for fairness.

(7) Similarly, only a very small percentage answered "yes" to the question "Did the personality or attitude of the lawyers affect your verdict?" Those jurors who made comments said that they had tried not to allow the lawyers' attitudes to affect them. Some thought they were adversely affected, partially by the personality, but more by the tactics of attorneys.

(8) "Was the judge helpful in getting to you a clear understanding of the evidence?" This question and the questions relating to comments by the judge on the evidence and on how to weigh the evidence were aimed at rather close distinctions and the answers show thoughtful variance. As to the helpfulness of the judge in getting a clear understanding of the evidence to them, only about one in twenty jurors said "no." It was suggested that, though the judges were helpful, there was room for greater helpfulness.

(9) While about one in sixteen thought that their verdicts were affected by the attitude and personality of the lawyers, only about one in twenty-two conceded that the fact that attorneys appeared to oppose each other had any effect in their consideration of the facts.

(10) By a vote of more than three to one, the jurors indicated that it would have been helpful if the judge had made to the jurors a clear statement of their duties before they were called to serve in a given case.

(11) By a score of about three to one the jurors answered that attorneys were *generally* fair in the presentation of both evidence and argument. Many of the "yes" answers had the word "generally" underlined. It would seem to be a reasonably fair inference from the answers that attorneys are not impressing jurors as officers of the court. Over one-third flatly stated that they were not "generally fair." Jurors seemed to think that the attorney is for his client, right or wrong.

(12) On the question of fairness, bias or favoritism, the judges fared better than the attorneys. The different positions and duties of attorneys would tend to justify such a difference. About one juror in thirteen thought that the judge was inclined to favor one side or the other.

(13) By an endorsement of about three to one, jurors were of the opinion that it would be

helpful if the judge were permitted to make comments to the jury upon how to weigh the evidence.

(14) As to comments by the judge on the evidence, the affirmative weakened and the "no" vote increased as compared with the vote on the limited question concerning the giving of help to the jury upon how to weigh the evidence. Those favoring comment by the judge upon the evidence were, however, in a majority. Here again it appears that the juror is jealous of his absolute freedom in the field of finding the facts. The answers to questions (12), (13), and (14), just above under consideration, are a bit difficult to harmonize.

(15) The jurors were definitely opposed to the idea of abolishing the jury system. Less than one in twenty-one said that it should be abolished.

(16) Upon the thought whether a trial under present procedure impressed the jurors as an honest effort to determine what the truth is, about fourteen per cent of the jurors were bothered by the actions of attorneys and the statements of other jurors. To those troubled ones, a trial was a battle of wits with the best man winning.

(17) This question was either a very good one or a very bad one. It was: "Did the trial impress you as a contest of skill or learning?" The great variance in the answers to questions (16) and (17) is difficult to reconcile. In answering this question some took the view that the trial was a scholarly attempt to get the truth and dispense justice. Others thought that the trial was a battle of wits, skill, and learning, used to hide the truth and win. The general criticism was that there was too much skill and learning and not enough common-sense effort to find the truth. The "yes" and "no" answers were about equal. Some interpreted the question as asking whether the trial was a contest of skill on the one hand and of learning on the other. Good or bad (and I now think it was badly worded), the question brought much vigorous comment.

(18) To the question "Were your verdicts affected more by other members of the jury than by the instructions of the court or arguments of attorneys?" the answers were a plain assertion of the juror's feeling of independence and of confidence in himself to understand the situation. Jurors would apparently like to think that they are unaffected by the suggested influence.

(19) "Did you find the attitude of the jury was affected by the attitude of the judge or attorneys in arriving at the verdict of the jury?" This question

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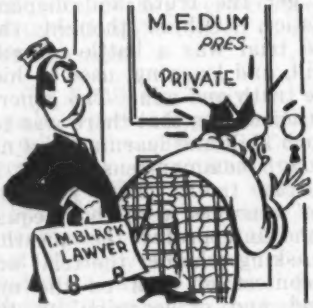

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sought to put each individual juror in one corner of a rectangle and to get his opinion as to the influence of the other three factors in the square—the judge, the attorneys, and his fellow members—as he saw them from his individual point of view. Without much comment, the jurors again, by a ratio of three to one, asserted their independence and their confidence in being able to accurately estimate the weight of the influences.

(20) The final question had to do principally with instructions. It asked "Did the instructions of the court make clear to the jury the issue or issues between the parties so as to enable you to determine the fact or facts necessary to be found from the evidence in arriving at a verdict?" The general trend of the answers was very complimentary to judges' instructions. The "yes" answers preponderated by a ratio of about twenty to one. The comments indicate that the average juror, if the group of 1,500 from all parts of the state can be said to be average, has confidence in himself to understand and to do the right thing. Many drew a distinction between making the issues clear and making the instructions understandable. From this it is evident that many jurors find legal language difficult to understand.

A Canadian Will a Century Ago

Contributed by OLIVER SHEPPARD, Penn Yan, N. Y.

[From the papers of the late George S. Sheppard, Attorney, Penn Yan, N. Y.]

DR. WM. DUNLOP of Colborne Township, Ont., left the following queer last will:

In the name of God, Amen. I, William Dunlop, of Gairbraid, in the Town of Colborne and the District of Huron, Western Canada, Esquire, being in sound health and my mind just as usual, which my friends who flatter me say is no great shakes, do make my last Will and Testament as follows: Revoking, of course, all former wills and Testaments, I leave the property of Gairbraid and all other landed property I may die possessed of to my sisters Ellen Boyle Storey and Elizabeth Dunlop—the former because she is married to a minister whom, God help, she henpecks, the latter because she is married to nobody nor is she likely to be for she is an old maid and not market-ripe. I leave them and their heirs my share of the farm stock and implements provided, always, that the enclosure about my brother's grave be reserved and if either should die without issue then the other to inherit the whole.

I leave to my sister-in-law, Louisa Dunlop, all my share of the household furniture and such traps with the exceptions hereafter mentioned.

I leave my silver tankard to the eldest son of old John as the representative of him—I would leave it to old John himself but he would melt it down and make temperance medals and that would be a sacrilege. However, I leave my big horn snuffbox to him—he can make temperance spoons with that.

I leave my sister Jenny my Bible, formerly the property of my great-grandmother, Bertha Hamilton of Woodhall, and when she knows as much of the spirit as she does of the letter she will be a better Christian than she is.

I also leave my late brother's watch to my brother Sandy, exhorting him at the same time to give up Whiggery, Radicalism and all other sins that do most easily beset him.

I leave my brother Allen my

silver snuff-box, as I am informed he is rather a decent Christian with a swag-belly and a jolly face.

I leave Parson Chevassie, Maggie's husband, the small box I got from the Sarnia Militia, as a slight token of gratitude for the service he did the family in taking a sister that no man of taste would have taken.

I leave John Caddel a silver tea-pot to the end that he may drink tea therefrom to comfort him for having a slatternly wife.

I leave my books to my brother Andrew because he has so long been a jangly wallow that he may learn to read them.

I give my silver teacup with a sovereign in it to Janet Graham Dunlop because she is an old maid and pious and therefore will, necessarily, take to horning, and also my Granny's snuff-box as it looks decent to see old women taking snuff.

In Witness Whereof I have hereunto set my seal, this thirty-first day of August in the year of our Lord One Thousand eight hundred and forty-two.

(Signed) William Dunlop

Court Relief

Down in a rural Georgia court a jury was being selected. One man, a rather surly-looking farmer, was claiming exemption, but seemed very reluctant to state the grounds for his claim. At last, when pressed, he blurted out:

"Well, your honor, the truth is I have the itch."

"Clerk," was the judge's instant demand, "scratch him off, scratch him off!"

Mr. De Bonus Non

The original administrator died and a public administrator was appointed de bonus non. There was a Home Owners' Loan on the property and he notified this Federal Bureau of the appointment.

On March 29, 1944, he received a letter of which only a part is quoted:

> "On December 16, 1943, you informed this office that De Bonus Non had been appointed administratrix to handle the affairs of the estate of Silas and Mayme James."

He is still wondering who might be considered Mr. De Bonus Non.

Contributor: D. A. Castle, Elko, Nevada.

Some Aspects of Cross-examination

By THEODORE KIENDL of the New York Bar

Condensed from New York State Bar Association Bulletin, April, 1946

THERE exists a prevalent notion that cross-examination is an instrumentality that only can be employed effectively by those who have been touched by the magic wand of genius. There is nothing particularly mysterious involved in an attempt to elicit helpful evidence from adverse witnesses. The acquisition of efficient adeptness in this so-called art is within the reach of any lawyer who seriously seeks to attain it. No member of the profession should be deterred from attempting to acquire the experience that is necessary and the proficiency that will follow, by accepting the view that cross-examination is a luxury to be indulged in only by rarely gifted trial lawyers.

Unfortunately, it is true that the strategy and technique of cross-examination are not susceptible of being circumscribed by any comprehensive set of rules. Witnesses vary as do individuals, and every witness turned over for cross-examination presents a separate problem that cannot be solved by the rigid application of any general code of rules. The cross-examiner must reserve to himself a certain measure of versatility and resourcefulness, without which he would be unduly hampered and rules designed to control him are not conducive to such freedom of action. It does not follow that the lawyer who is about to embark on such an assignment is deprived of the protection that the bar's accumulated experience should have provided. Quite to the contrary, many danger signals have been erected to make such an undertaking comparatively safe. Commandments they are not. Rules to be slavishly followed they are not. But they do supply some basis for an intelligent decision on the proper course to be followed.

Some members of the trial Bar, relatively few in number, believe that the best cross-examination is no cross-examination at all. It is the easy way out,

but, essentially, it represents a defeatist attitude. In a great majority of cases it will serve only to supply your adversary with the telling argument that your silence must be construed as an admission that the witness's testimony is unassailable. You should never be heard in court to say "No cross-examination, your Honor" unless you are fully convinced either that the witness's testimony cannot be used against you or that there is absolutely nothing that you can reasonably hope to accomplish which will counteract whatever damaging effect his direct examination produced.

There are other members of the Bar who follow the practice of refraining from cross-examination unless they can be assured that such questions as they put will be answered favorably to their side of the case or, if the answers should be unfavorable, that compelling evidence refuting such testimony is otherwise available. That approach has much to commend it. It presents a point of view founded on reason and common sense and should unhesitatingly be applied in every case—except where the attainment of your goal is impossible if such conservatism controls your action. Unfortunately, the exceptions are many. Let me cite two comparatively recent federal cases, in each of which you will see what probably would have happened by adopting any such standard policy and what actually happened by deliberately departing from it.

The first case was the trial of a criminal indictment for conspiracy to violate the provisions of the Selective Service Law. The government's main witness against our client, the principal defendant, was his former secretary. On direct examination, this secretary succeeded in introducing such damaging evidence against him that it was obvious that a conviction would be well-nigh inevitable unless her credibility could be substantially and successfully attacked. We had assembled considerable material for the purposes of cross-examination. With usual dexterity she managed to escape from most of the traps we so carefully prepared, and our progress was more or less impeded by her ability to answer questions in such a way as to minimize the chances of obtaining an acquittal.

There were three anonymous typewritten letters in the client's draft board file. They were obviously poison-pen letters. We strongly suspected that they emanated from this witness, but had been completely unsuccessful in our exhaustive attempts to assemble some proof to that effect. We believed that she would deny that she sent these letters, and the problem was as to how far, if at all, we should cross-examine her on this subject. After a

thorough consideration of all the pros and cons, we decided to pursue it, in clear violation of this very policy of avoiding cross-examination under such circumstances. In doing so, the witness's animosity was aroused to the point where her native shrewdness temporarily deserted her.

Apparently secure in her conclusion that we could not prove the contrary, she vehemently denied the authorship of the letters and any knowledge of their existence. When she admitted that she owned and operated a typewriter at the time the letters were written, we suggested by an appropriate question that it doubtless was no longer in her possession. Off her guard, she snapped out an answer to the effect that we were quite mistaken, as that very machine was in her home and in use. It was not difficult then to compel her to agree to produce it in court, and when it was produced and carefully identified, our troubles were over, as we later discovered.

We employed an outstanding expert on questioned documents to make a thorough study of the typewriter, the three anonymous letters and a number of admittedly genuine typed letters that the witness had written. He detected so many peculiarities in language, spelling, punctuation, spacing and other significant tell-tales that were common to both the questioned anonymous letters and the genuine documents that we were persuaded that it was inconceivable that a jury could find that they were not typed by the same person. When the expert took the stand, with the elaborate charts and enlargements he had prepared, the necessary foundation for the introduction in evidence of the three anonymous letters was laid. The letters not only served squarely to contradict the secretary, but exposed the motivation that we claimed permeated her entire testimony.

The second case was a civil case in the federal court, the plaintiff, an Italian-born sculptor living in Philadelphia, sued to recover three and a half million dollars for alleged appropriation by the defendant company of a fountain pen which he claimed to have invented, without patent protection, and confidentially disclosed to the defendant on the company's express assurance that it would agree not to use any of the inventive ideas embodied in the pen without plaintiff's consent and prior agreement as to compensation. A fountain pen was later put on the market by the defendant and proved to be a sensation. The plaintiff claimed it was his and the defendant that he had contributed nothing to either its design or mechanism. Possessed of a very shrewd intellect and a facility for adapting himself instantly

to whatever embarrassing situation might arise, the plaintiff made great headway with the jury on his direct examination. When time for cross-examination arrived, his self-confidence had reached a very high point and we wondered just how to proceed. There was no doubt that all his answers would be as unfavorable as he could possibly make them, and in many respects we could foresee real difficulty in attempting to prove the contrary. However, the situation was one that warranted abandonment of any preconceived notions of restricting cross-examination within indicated limits. The battery of defense counsel agreed that it was advisable to start his cross-examination in such a way and on such relatively unimportant matters as would tend to create an impression in his mind that we were seriously concerned about really locking horns with him. In these preliminary skirmishes he countered so successfully that he apparently persuaded himself that he could aid his case by a frontal attack on his cross-examiner. As he warmed to his task, we purposely permitted him free rein in his attempt to show up his inquisitor in the minds of the jury. Even his agile mind could not prevent him from making some glaring mistakes, and when enough of them had accumulated the opening that we sought finally presented itself.

The situation was about this: When questioned about portions of the very extended examination before trial for which he alone was responsible, he delighted in explaining how he had been grilled and how he had been constantly interrupted in his attempts to answer. The full picture he painted reflected most unfavorably on the lawyer who had conducted the examination before trial and was conducting this cross-examination. You could almost feel the satisfaction he was deriving from this unexpected opportunity to embarrass opposing counsel, and we were not unaware that the jury might be forming impressions which would be hard to dislodge. However, we had made our bed deliberately and persisted with that very sub-

"See, Judge, what my new hair tonic is doing for you!"

ject. A series of questions about his professed ignorance and inexperience in litigated matters was our trump card. It permitted the witness to tell most dramatically that his only recourse to the courts was when he was compelled to sue those who refused to pay for the honest services he had rendered as a sculptor in their employ. It was hard to believe that he could have let himself into such a trap.

At this point a colleague reached into his brief case and extracted a certified search of the judgment rolls of the various courts of the City of Philadelphia. It contained an imposing list of over fifty judgments that had been recovered against the plaintiff down through the years, some of them unsatisfied and most of them after suits had been commenced against him. Confronted with this proof, which otherwise might have been inadmissible, plaintiff proceeded to dodge further questions on the subject until sharply rebuked by the federal judge presiding. Eventually he was thus forced into the position of admitting that the records were correct, thus completely discrediting his prior testimony and enabling the jury to infer that he had continuously evaded the payment of his just bills. The whole complexion of the trial changed completely, and the jury ultimately determined that his testimony on direct examination could not be accepted.

Those who confine cross-examination to the bare essentials and restrict it to an irreducible minimum are much more likely to obtain satisfactory results than those who are inclined to roam everywhere. It is not easy to bring to a stop the vehicle of cross-examination once you set it in motion. It requires good judgment and something akin to self-sacrifice to put on the brakes and suddenly halt the process when it could be continued more or less indefinitely. At least, the writer found this was so in a case which was tried four successive times and settled when the fifth trial was about to open.

The plaintiff in a railroad negligence case claimed that his unusually serious injuries were sustained as the result of a brakeman literally knocking him off a ladder on the side of a rapidly moving coal car by the effective application of a stout brakestick to his head. The fact was, as we understood it, that the plaintiff attempted to jump off the through freight train on which he was taking a free ride, when it was proceeding rapidly through a town the plaintiff desired to visit. Whoever prepared the plaintiff for his testimony in court did a thorough job. On direct examination at all four trials plaintiff's version of the occurrence of the accident was perfect.

On the first three trials he was exhaustively cross-examined without regard to any of the danger signals we have been discussing, and without the slightest effect on the substance of his testimony. He was just impervious to cross-examination. On the fourth trial, convinced of our complete inability to extract any helpful evidence from this plaintiff, we cross-examined him most sparingly and with respectful regard to the policy of confining questions within a bare minimum. The first three trials had resulted in the recovery of large verdicts, but these mistakes had been corrected either by the trial or appellate courts. The fourth trial resulted in a disagreement, the best result we were able to obtain, and the railroad company, convinced of the futility of ever hoping to get a jury verdict in its favor, and apprehensive that an adverse verdict might ultimately be sustained, authorized the settlement of the action for a comparatively modest amount.

There is, however, one rule regarding cross-examination that is fundamental, permits of no exception, and invariably should be followed, that is, the rule of preparedness which requires the thorough-going preparation, assembly and presentation of the necessary material. It is unusual in a protracted t[illegible]f situations do not devel[illegible] lit[illegible]rally at the last moment, which can be used to advantage in cross-examination. Even in shorter trials such situations frequently occur. In all cases the continuation of preparation should not stop when the case is called for trial, if cross-examination is to be fully effective. Of course, this rule of preparation is but a branch of the all-inclusive rule that stresses the importance of adequate preparation for every phase of every trial in which you may participate as trial counsel.

Sometimes, if you are fortunate, the material for devastating cross-examination is dropped in your lap at the last minute.

In a railroad no-report negligence case, a female plaintiff testified very forcibly on direct examination to both the defendant's liability and her right to recover substantial damages for more or less subjective but serious permanent nervous injuries she had sustained. On cross-examination we were groping in the dark when some rumor came to our attention that the plaintiff had been in the employ of a life insurance company for many years. She categorically denied the employment and there seemed no possible way to prove it or to make any use of the fact even if it could be proved. Associate counsel, however, persisted in investigating this lead, and to our astonishment, was able to produce a number of witnesses who were prepared to

testify to the denied employment and furthermore to the fact that the plaintiff had been suffering chronically, long before the alleged accident, from the very condition for which she was seeking damages. They even produced a record of her extended hospitalization in the life insurance company's sanitarium for that very condition. At first she brazenly denied it all. When it became apparent that we were going to prove it conclusively, she failed to appear in court the next morning and her relatives came in to explain that her entire story had been made up out of whole cloth.

Such last-minute material does not develop sufficiently often to warrant the expectation that cases apparently lost can be won by some such good fortune. However, these cases point out how important it is not to relax in your efforts to obtain all the necessary material without which cross-examination can be and usually is of little avail. It is almost axiomatic that cross-examination is as successful or as unsuccessful as the preparation which preceded it. There are still some gifted cross-examiners who think that their skill and versatility will prove a substitute for adequate preparation. They deceive no one but themselves. Their success is usually proportionate to their industry. The old legend about distinguished trial counsel walking up Nassau street to court with his assistant and asking "What's this case we're going to try this morning," without any advance knowledge or preparation, no longer obtains, [illegible] when you encounter an [illegible]ry who proceeds on an [illegible] premise, and you are [illegible]equately prepared, you can confidently expect to obtain an unconscionable advantage at the trial.

There is one further aspect of the problem that deserves mention and warrants your careful consideration, and that is the necessity of keeping in mind constantly the normal reaction of most jurors to cross-examination generally. From your point of view it may present a cherished opportunity to display your skill and thus impress your client with the high dollar-value of the services you are rendering. Its dangers or its advantages may be uppermost in your mind. But you must remember that all such considerations are purely personal to you and of no concern whatever in the mind of the juror you are trying to persuade. The trier of the fact may be amused by an exhibition of your ability. He may admire the facility with which you operate, but ultimately his determination is presumably controlled by the persuasive effect of the evidence you produce on the issue being tried. He views your cross-examination from the standpoint of an impartial

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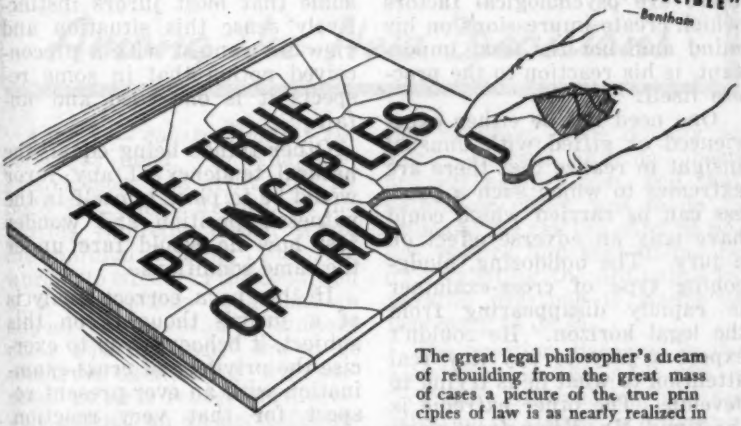
—Bentham



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observer. He is but human, and there are psychological factors which create impressions on his mind and, not the least important, is his reaction to the process itself.

One need not be either experienced or gifted with unusual insight to realize that there are extremes to which such a process can be carried which could have only an adverse effect on a jury. The bulldozing, bludgeoning type of cross-examiner is rapidly disappearing from the legal horizon. He couldn't expect a jury to pay any real attention to what he is trying to develop. The other extreme is the timid Mr. Milquetoast variety, who treats adverse witnesses with kid gloves, either through fear or ignorance, and thereby excludes the possibility of a jury rejecting the testimony. To either extreme reasonably competent trial counsel would never go.

A powerful weapon is placed in your hands for use against a lay witness. He is wholly untrained in legal technicalities and is more or less nervous about the prospect of competing with experienced counsel where his credibility, or, at least, the accuracy of his recollection, is under attack. You should assume that most jurors instinctively sense this situation and view the contest with a preconceived notion that in some respects it is one-sided and unfair.

Other things being equal, the natural tendency of any juror would be to place himself in the witness's position and wonder just how he would fare under the same conditions.

If this be a correct analysis of a juror's thoughts on this subject, it behooves you to exercise the privilege of cross-examination with an ever-present respect for that very reaction. There is a real possibility that a juror will resent your taking the slightest advantage of the process. You must be tactful. You must exhibit all that consideration and politeness that is due to a witness even when he is being cross-examined. You must be ever mindful of the inherent danger of antagonizing the triers of the fact by any act or conduct on your part that reasonably could be construed by any juror as an attempt to take advantage of the official position in which you are placed when you are cross-examining.

The Witness

In a Bucks County, Pa., divorce hearing two witnesses had testified for the wife Libellant that her doctor said she was on the verge of a "nervous break-down". A third witness said she heard the doctor say; "If your sister doesn't leave her husband, she will have a nervous bust".

Contributed by: C. S. Boyer, Doylestown, Pa.

Among the New Decisions

Appeal — *construction of supersedeas bond.* In Knapp v. Fredrickson, 163 ALR 407, 23 So2d 762, Judge Buford, of the Florida Supreme Court, wrote the opinion holding that the words "to effect" in the condition of a supersedeas bond that an appeal be prosecuted "without delay and to effect," are to be construed as meaning "with success," so as to render it enforceable against an unsuccessful appellant.

The annotation in 163 ALR 410 discusses "When appeal is or is not deemed to have been prosecuted 'with effect' or 'to effect' within condition of supersedeas bond."

Automobiles — *summary removal of illegally parked cars.* Judge Foster, of the Alabama Supreme Court, wrote the opinion in McLaurine v. Birmingham, 163 ALR 962, 24 So2d 755, holding that one cannot complain that a municipal ordinance subjecting illegally parked automobiles to summary removal by the police was arbitrarily and unequally enforced against him because his car was taken away while other cars parked overtime were not impounded, where it appears that he had persistently violated the law over a period of years, some seventy or more charges having been brought against him, and that before an effort was made to impound his car the chief of police warned him that unless he quit violating the ordinance by parking overtime it would be necessary to do so.

The question discussed in the annotation in 163 ALR 966 is "Validity, construction, and application of statute or ordinance for removal of automobiles parked in the street contrary to regulations."

Bankruptcy — *dischargeability of fine for criminal contempt.* In Parker v. United States, 163 ALR 379, 153 F2d 66, Judge Magruder of the First Circuit, wrote the opinion holding that a fine imposed for a criminal contempt is not a "debt" within the meaning of § 1 (14) of the Bankruptcy Act, and not being a provable debt is not affected by discharge in bankruptcy proceedings under Bankruptcy Act, § 17.

The annotation in 163 ALR 389 discusses "Fine for contempt as provable or dischargeable in bankruptcy."

Blood Test — *admissibility of blood-grouping test.* The Maryland Court of Appeals in Shanks

v. Maryland, 163 ALR 931, 45 A2d 85, opinion by Chief Justice Marbury, held that the admission in evidence in a rape prosecution of testimony of an expert tending to show that blood taken from the coat of the accused could not have come from a third person as claimed by the accused, but was of the same type as the victim's blood, does not violate the constitutional right of the accused to refuse to testify against himself.

The annotation in 163 ALR 939 exhaustively covers the question "Blood-grouping tests."

Criminal Law — *escape as justified by innocence.* In Moore v. Commonwealth, 301 Ky 851, 163 ALR 1134, 193 SW2d 448, opinion by Sims, J., the position is taken that one is none the less guilty of the offense of breaking jail while held on a charge of housebreaking because his conviction for housebreaking was

"But we did talk things over! That's why we want a divorce!"

reversed on the ground that he was not shown guilty of that offense.

The annotation in 163 ALR 1137 discusses "What justifies escape or attempt to escape, or assistance in that regard."

Default Judgment — *faulty allegations in.* A practice question is presented in the case of Lindsey v. Drs. Keenan, Andrews & Allred, 163 ALR 487, 165 P2d 804. Judge Cheadle wrote the opinion holding that a judgment for damages upon a default is not justified where the complaint fails to state a cause of action.

One phase of this question is treated in the annotation in 163 ALR 496 under the title "Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine amount of damages following defendant's default."

Divorce — *validity of foreign divorce.* In Cohen v. Cohen, 163 ALR 362, 64 NE2d 689, the Massachusetts Supreme Court, opinion by Wilkins, J., held that the filing of an appearance by defendant in a divorce suit in a state in which neither party is domiciled does not cure the jurisdictional defect.

The flood of decisions since the Williams Case are collected in the supplemental annotation in 163 ALR 368 on "Duty to recognize and give effect to decrees of divorce rendered in other states, or in a foreign country, as affected by constructive service of process or lack of domicil at divorce forum."

Employment Contract—*agreement not to engage in business.* Judge Gilkison, of the Indiana Supreme Court, wrote the opinion in Jenkins v. King, 163 ALR 397, 65 NE2d 121, holding that a provision in a contract of employment for a two-year period, at the end of which a new agreement was to be made, that in case the person employed should leave the service of the employer he would not for a period of five years thereafter engage in the same line of business, is to be construed as having reference to leaving the service before completion of the agreed term, and is therefore inapplicable where the employee has served the full term, although he has continued in the employment but without making a new contract.

The annotation in 163 ALR 405 discusses "Operation of negative or restrictive covenant in contract of employment for a specific period, as extended by continuance in the employment after the expiration of that period."

Evidence — *res gestae in accident cases.* Chief Justice Simmons, of the Nebraska Supreme Court, in Hamilton v. Huebner, 163 ALR 1, 19 NW2d 552, wrote an opinion outlining the time limitations on the res gestae rule. The holding is to the effect

that testimony as to statements by a person who had been stricken with coronary thrombosis after trying to start a small gasoline engine by pulling a rope wound around the flywheel, made to his wife in response to an inquiry as to the cause of his condition, and to the attending physician, that when the rope broke he slipped and fell, is inadmissible to prove the fact where there is no evidence that he suffered a shock as the result of the alleged accident, and he made no mention of any untoward event to other persons who saw him shortly after he had begun to feel ill, including one whom he asked for another rope.

An elaborate annotation in 163 ALR 15 discusses "Res gestae utterances in actions founded on accidents."

Executors and Administrators — *duty to pay "back taxes" on real estate.* The Iowa Supreme Court in Re Estate of McMahon, 163 ALR 720, 21 NW2d 581, opinion by Wennerstrum, J., held that where both by the law of the state of administration and the law of the state in which real property is located a tax upon realty is not a personal obligation of the owner, an unpaid tax is not within a direction in the owner's will that his debts be paid by the executor.

The annotation in 163 ALR 724 discusses "Duty or right of executor or administrator to pay tax on real estate of his decedent."

Factory Regulation — *cold-storage plant as "factory."* The New York Court of Appeals in Red Hook Cold Storage Co. v. Dept. of Labor, 295 NY 1, 163 ALR 439, 64 NE2d 265, opinion by Desmond, J., held that a cold-storage plant cooled by refrigerating machinery, in which apples are sorted by a power-driven sizing machine and apples and pears are stored, is a "factory" subject to state labor department regulations having to do with the health and safety of employees, within a statutory definition of "factory" as including places where persons are employed "at manufacturing, including making, altering, repairing, finishing, bottling, canning, cleaning or laundering any article or thing, in whole or in part," the commercial purpose of such a plant being the same as that of canning factories.

The annotation in 163 ALR 447 discusses "What is a 'factory' within statutes relating to safety and health of employees."

Fair Trade Act — *breach by others as defense.* In Hutzler Brothers Co. v. Remington Putnam Book Co., 163 ALR 884, 46 A2d 101, a well-reasoned Maryland case, opinion by Delaplaine, J., the position was taken that a producer is entitled to an injunction against the violator of its fair trade and resale price agreements even though it has been

unable to get full compliance with such agreements from all retail dealers, where it has made diligent efforts to secure compliance, and to prevent price cutting, by other violators.

The annotation in 163 ALR 889 discusses "Right to relief for violation of resale price agreement under fair trade act, as affected by permitting or failing to prevent violation by dealers other than defendant."

Income Taxes — *deductions of legal expenses.* An interesting opinion of considerable importance to the legal profession, written by the late Chief Justice Stone, is contained in Bingham v. Com. of Internal Revenue, 325 US 365, 85 L ed 1670, 163 ALR 1175, 65 S Ct 1232. It was there held that legal expenses paid by trustees in contesting a deficiency assessment of income tax and for legal advice in connection with the payment of a legacy and with tax and other problems arising upon the expiration of the trust and relating to the final distribution of its funds, if ordinary and necessary, are deductible from gross income in the computation of the trust's income tax as "nontrade" or "nonbusiness" expenses within the meaning of § 23(a)(2) of the Internal Revenue Code authorizing the deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

The supplemental annotation in 163 ALR 1188 discusses "Deductibility of attorneys' fees or other expenses paid or incurred by taxpayer in preparing tax returns, contesting taxes, or attempting to obtain tax refund."

Income Taxes — *trust income where settlor has reserved right to change beneficiaries.* Circuit Judge Sibley, of the Fifth Circuit, in Hawkins v. Com. of Internal Revenue, 163 ALR 745, 152 F2d 221, held that the settlor of an irrevocable trust in the management of which he has no voice, for beneficiaries whom he is under no legal obligation to support or educate, has reserved to himself power to modify the provision as to distribution among the beneficiaries named but not to introduce others, does not make the trust income his income for tax purposes.

Attorneys who draft living trust instruments should refer to the annotation in 163 ALR 750 on "Reservation to settlor of power to alter or modify trust provisions as regards distribution among named beneficiaries as subjecting him individually to income tax."

Insurance — *effect of knowledge of insured's health by insurance agent.* The Georgia Supreme Court in Life and Casualty Insurance Co. v. Williams, 163 ALR 686, 36 SE2d 753, held

in an opinion by Head, J. that an insurer is not estopped by its agent's knowledge at the time a life insurance policy was issued, that insured had tuberculosis, from relying on a provision of the policy that within two years from the date of issuance the insurer's liability shall be limited to the return of premiums paid if the insured was not in sound health upon the date of issuance and delivery of the policy or if the insured before its date had tuberculosis, where the policy provides that it contains the entire contract and that agents are without authority to waive any of its provisions.

The several views on this question are discussed in the annotation in 163 ALR 691 under the title "Provision of life insurance policy limiting insurer's liability under specified conditions to return of premiums, as subject to waiver or estoppel by reason of agent's knowledge of breach of condition respecting insured's health."

Insurance — *insurance company's right to physical examination.* The Pennsylvania Supreme Court, opinion by Justice Allen M. Stearne, held in Myers v. Travelers Insurance Co., 353 Pa 523, 163 ALR 919, 46 A2d 244, the fact that a policy insuring against disability requires only that the insured furnish due proofs of physical disability does not preclude the court, in an action for disability benefits, from requiring the plaintiff, in its discretion, to submit to a reasonable physical examination.

The annotation in 163 ALR 923 discusses "Requiring physical examination of insured in action for disability or accident benefits."

Intoxicating Liquors — *limiting number of licenses.* In State v. Miami, 163 ALR 577, 24 So2d 705, the Florida Supreme Court, opinion by Chief Justice Chapman, held that where the legislature has authorized a municipality to enact zoning ordinances regulating the location of places for the sale of liquor, an ordinance providing that a license shall not issue for a place within a stated distance of an established licensed establishment infringes no constitutional right.

The annotation in 163 ALR 581, supplementing an earlier annotation in the series, discusses "Power to limit the number of intoxicating liquor licenses."

Labor Dispute — *injunction for seizure of employer's plant.* The Pennsylvania Supreme Court, opinion by Justice Horace Stern, held in Westinghouse Electric Corp. v. United Electrical, Radio and Machine Workers of America, 163 ALR 656, 46 A2d 16, that the obstruction of entrances to a struck plant by mass picketing, making it impossible to enter the plant without the consent of the strikers, is, where for the purpose of implementing an expressly declared

policy to prevent ingress and egress, a seizure of the plant within an exception to a statute prohibiting the issuance of injunctions in labor disputes made where strikers seize, hold, damage, or destroy the plant or other property of the employer with the intent of compelling the employer to accede to any demands, conditions, or terms of employment or for collective bargaining.

See the annotation in 163 ALR 668 on "What amounts to seizure and holding of employer's plant, equipment, machinery, or other property within statutory exception to inhibition on injunctions in labor disputes."

Landlord and Tenant — *employment contract as sublease or assignment.* In a very practical case, Bedgisoff v. Morgan, 163 ALR 513, 162 P2d 238, 167 P2d 422, Justice Mallery, of the Washington Supreme Court, wrote an opinion holding that a provision in a lease of a theater against assignment without the lessor's consent may properly be found to have been violated by the act of the lessees in entering into a so-called management agreement with third persons after the lessor had refused to consent to a proposed assignment of the lease to such persons, to whom the lessees had also proposed to sell equipment owned by them, whereby the so-called managers were to guarantee the lessees a stated sum per month, pay the expenses of operation, and receive as compensation any surplus over the operating expenses and guaranteed return — especially where such persons paid for the management contract the same amount as they were to pay for the assignment of the lease, and the guaranteed return was the sum which they had agreed to pay monthly for a period equal to the life of the lease, for the equipment.

The cases on this question are discussed in the annotation in 163 ALR 532, under the title "What amounts to assignment or sublease as distinguished from employment contract, within provision of lease against assignment or sublease without lessor's consent."

Landlord and Tenant — *injury due to landlord's failure to repair.* Citing the American Law Institute's Restatement of Torts, the Minnesota Supreme Court in Saturnini v. Rosenblum, 217 Minn 147, 163 ALR 294, 14 NW 2d 108, opinion by Justice Gallagher, held that a lessor's failure to perform his agreement to make repairs renders him liable in tort for a consequent injury to a member of the lessee's family.

The editor of the annotation in 163 ALR 300 shows the shift in views on the question "Breach of lessor's agreement to repair as ground of liability for personal injury to tenant or one in privity with latter."

Leases — *option to purchase as applying to extended term.* The Maryland Court of Appeals in Schaeffer v. Bilger, 163 ALR 706, 45 A2d 775, opinion by Chief Justice Marbury, held that where a lease for a term of three years contained a provision whereby the tenant by giving a specified notice might "extend the term hereby created for another term of five years . . . subject to the aforegoing covenants and conditions otherwise herein contained" and a further provision giving the tenant an option to purchase "at any time during the period of the term hereby created," the option is exercisable during the extended term.

Supplementing an earlier annotation on the question the later decisions are collected in the annotation in 163 ALR 711 on "Renewal or extension of lease as extending time for exercise of option to purchase contained therein."

Marketable Title — *after-acquired title.* An interesting title

"He's absolutely impartial!"

question was decided by the Maryland Court of Appeals in Garner v. Union Trust Co., 163 ALR 431, 45 A2d 106. Justice Delaplaine wrote the opinion holding that the title acquired by the vendor in a land contract as purchaser at the foreclosure of a mortgage purporting to be of the fee given by a mortgagor then owning only a leasehold estate, and who thereafter acquired the fee by a conveyance made for the purpose of merging the leasehold estate, is a good and merchantable title which the vendee may be required to accept when the record does not show any equity superior to the equitable lien of the mortgage, but only judgments entered against the mortgagor after he had acquired the fee.

In 163 ALR 437 the annotation discusses "Marketability of title as affected by fact that grantor or mortgagor in chain of title acquired complete or perfect title after conveyance."

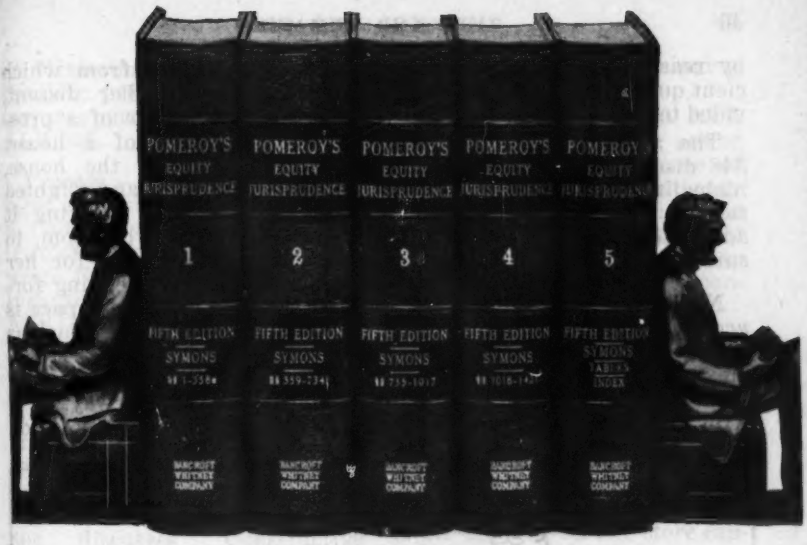
Mechanics' Liens — *improvements to be paid out of rent.* Justice Butzel, of the Michigan Supreme Court, in Merithew v. Bennett, 313 Mich 189, 163 ALR 988, 20 NW2d 860, wrote the opinion holding that the effect of a lease providing for the application of an increased rental to the payment of a loan for the purpose of making certain improvements desired by the lessee, is to constitute the lessee the agent for the owner in contracting for the improvements, so as to subject the fee to a mechanic's lien for labor performed and materials furnished in making the improvements.

The annotation in 163 ALR 992 discusses "Lessee as agent of lessor within contemplation of mechanic's lien laws."

Mining Leases—*rescission for unprofitableness.* The West Virginia Supreme Court of Appeals in Babcock Coal and Coke Co. v. Brackens Creek Coal Land Co., 163 ALR 871, 37 SE2d 519, opinion by Lovins, J., held that equity will not relieve a lessee under a coal-mining lease of his obligation to pay a stated minimum annual royalty for the residue of the term because the coal can no longer be profitably mined.

The annotation in 163 ALR 878 discusses "Mistake as to existence, practicability of removal, or amount of minerals as ground for relief from mineral lease."

Municipal Corporations — *liability for loss by fire.* The New York Court of Appeals, opinion by Thacher, J., held in Steitz v. Beacon, 295 NY 51, 163 ALR 342, 64 NE2d 704, that a city empowered by its charter to construct and operate a system of waterworks and to maintain a fire department is not liable for the destruction of property by fire because of negligent failure to keep in repair and properly to operate certain pressure regulating valves in its water system,



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by reason of which an insufficient quantity of water was provided to combat a fire effectively.

The annotation in 163 ALR 348 discusses "Liability of municipality for fire loss due to its failure to provide or maintain adequate water supply or pressure."

Negligence — *contributory negligence in entering a dark unfamiliar place.* The New Mexico Supreme Court in Boyce v. Brewington, 49 NM 107, 163 ALR 583, 158 P2d 124, opinion by Justice Bickley from which JJ. Brice and Sadler dissent, held that the failure of a prospective purchaser of a house, who, in inspecting the house, opened the door to an unlighted basement stairway thinking it was the door to a bedroom, to exercise ordinary care for her own safety before stepping forward into the unlighted space is contributory negligence which as a matter of law precludes recovery for injuries sustained from falling down the stairway.

A very extensive annotation

"We're his handlers, your honor!"

on "Entering dark place on unfamiliar premises as contributory negligence" appears in 163 ALR 587.

Process — *to set aside judgment of nonresident.* In the U. S. Court of Appeals for the District of Columbia, Justice Clark wrote the opinion in Indemnity Insurance Co. v. Smoot, 163 ALR 498, 152 F2d 667. The holding was that an action in equity to set aside a judgment is an action in personam and not in rem, and personal service of process is necessary to give the court jurisdiction over a nonresident defendant.

The annotation in 163 ALR 504 discusses "Constructive service of process in action against nonresident to set aside judgment."

"Professional Conduct" — *necessity of prior definition.* The New York Court of Appeals in Bell v. Board of Regents of University of State of New York, 295 NY 101, 163 ALR 900, 65 NE2d 184, opinion by Conway, J., (Thacher, J. and Loughran, Ch.J. dissenting) held that prior formulation by the enforcing authority of the meaning of the term "unprofessional conduct" as used in a statute providing that a dentist's license may be revoked, suspended, or annulled for unprofessional conduct, is not essential to the suspension of the license of a dentist who has shared his fees on a percentage basis with a person bringing in patients.

The annotation in 163 ALR 909 discusses "Statutory power to revoke or suspend license of physician, dentist, or attorney for 'unprofessional conduct' as exercisable without antecedent adoption of regulation as to what shall constitute such conduct."

Sales — *selection of goods from "self-service" store.* A very interesting question in the law of sales was decided in the case of Lasky v. Economy Grocery Stores, 163 ALR 235, 65 NE2d 305. Justice Ronan wrote the opinion holding that a customer of a self-service store cannot recover against the operator of the store in an action based on implied warranty of fitness or of merchantability for personal injuries caused by the explosion of a bottle of carbonated beverage as she selected it from a case and was placing it in her basket for the purpose of purchasing it, since such liability is dependent upon the existence of contractual relations, and there was no sale and no contract of sale under this system of merchandising until the payment of the price to the cashier.

See the annotation in 163 ALR 238 under the subject "Law of sales and liability in respect thereof as applied to transactions in self-service stores."

Sales Tax — *materials sold to contractors.* In Crane Co. v.

Arizona State Tax Com., 163 ALR 261, 163 P2d 656, opinion by Morgan, J., the Arizona Supreme Court held that a tax imposed on retail sales is not payable in the case of sales of merchandise to contractors who use it in construction work done for others, where the taxing statute defines a retail sale as "a sale for any purpose other than for resale in the form of tangible property" and a wholesaler as "any person who sells tangible personal property for resale and not for consumption by the purchaser."

The annotation in 163 ALR 276 discusses "Sale of building materials, supplies, or fixtures to contractor, or his use thereof in construction or repairs, as sale at retail within tax statute or ordinance."

Securities Regulation — *sale of cemetery lots as "investment contract."* The Minnesota Supreme Court in State v. Lorentz, 163 ALR 1036, 22 NW2d 313, opinion by Magney, J., (Gallagher, J. dissenting) held that a sale of cemetery lots as an investment is a sale of securities or investment contracts within the operation of a statute requiring the registration of securities before offering them for sale to the public.

The annotation in 163 ALR 1050 discusses "What constitutes stock, securities, or investment contracts within contemplation of state and Federal statutes regulating sale of securities."

Taxation — *sale of product by public benefit corporation.* The Second Circuit of the U. S. Circuit Court of Appeals, opinion by Circuit Judge Chase, held in U. S. v. State of New York, 163 ALR 538, 140 F2d 608, that the sale of bottled waters by the Saratoga Springs Authority, a public benefit corporation of the State of New York to which has been turned over the control of mineral springs owned by the state and operated for the promotion of the public health, is not immune, as involving the performance of a nontaxable state function, from the Federal tax (§ 615(a)(5) of the Revenue Act of 1932) on the sale of bottled waters.

"Immunity of state and its agencies from Federal taxation as affected by the governmental or nongovernmental character of the particular functions involved." 163 ALR 542.

Venue — *vendee's action for fraud.* Justice Shenk, of the California Supreme Court, wrote the opinion in Kaluzok v. Brisson, 163 ALR 1308, 167 P 2d 481, holding that a vendee's action for damages for the fraudulent representations of the vendor of realty is not one for the determination of a right or interest in realty within the meaning of a venue statute, so as to be triable in the county where the land is situated rather than in the county of defendant's residence, even though complainant seeks to have the amount of the damages applied on a purchase-money note secured by a trust deed on the realty.

The annotation in 163 ALR 1312 discusses "Location of land as governing venue of action for damages for fraud in sale of real property."

Wills — *absence of limitation over in conditional gift.* In Patterson v. Brandon, 226 NC 89, 163 ALR 1150, 36 SE2d 717, opinion by Denny, J., the court held that where a will by which property was devised to one "if she looks after and takes proper care of" testator's wife contained no limitation over upon the failure of the devisee to take care of the wife, such failure does not work a forfeiture of the estate.

"Absence of limitation over in event of nonperformance of condition as to conduct or obligation of devisee, legatee, or grantee, as affecting operation of condition." 163 ALR 1152.

Wills — *gift to "worthy cause or institution."* Justice Horace Stern in the case of Re Funk, 353 Pa 321, 163 ALR 780, 45 A2d 67, wrote an opinion holding that a residuary bequest in the holographic will of an aged testatrix "to some worthy cause or institution" is properly construable as one to an institution of a charitable character, where otherwise the gift would be ineffective.

"Charitable gifts; definiteness." 163 ALR 784.

A PARABLE AGAINST PERSECUTION

By BENJAMIN FRANKLIN ★ ★

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AND it came to pass after these things, that Abraham sat in the door of his tent, about the going down of the sun.

And behold a man, bent with age, coming from the way of the wilderness, leaning on a staff.

And Abraham arose and met him, and said unto him, Turn in, I pray thee, and wash thy feet, and tarry all night, and thou shalt arise early in the morning, and go on thy way.

But the man said, Nay, for I will abide under this tree.

And Abraham pressed him greatly; so he turned, and they went into the tent; and Abraham baked unleavened bread, and they did eat.

And when Abraham saw that the man blessed not God, he said unto him, Wherefore dost thou not worship the most high God, Creator of heaven and earth?

And the man answered and said, I do not worship thy God, neither do I call upon his name; for I have made to myself a god, which abideth always in mine house, and provideth me with all things.

And Abraham's zeal was kindled against the man, and he arose and fell upon him, and drove him forth with blows into the wilderness.

And God called unto Abraham, saying, Abraham, where is the stranger?

And Abraham answered and said, Lord, he would not worship thee, neither would he call upon thy name; therefore have I driven him out from before my face into the wilderness.

And God said, Have I borne with him these hundred and ninety and eight years, and nourished him, and clothed him, notwithstanding his rebellion against me; and couldst not thou, who art thyself a sinner, bear with him one night?

And Abraham said, Let not the anger of the Lord wax hot against his servant; lo, I have sinned; lo, I have sinned; forgive me, I pray thee.

And Abraham arose, and went forth into the wilderness, and sought diligently for the man, and found him, and returned

with him to the tent; and when he had entreated him kindly, he sent him away on the morrow with gifts.

And God spake again unto Abraham, saying, For this thy sin shall thy seed be afflicted four hundred years in a strange land;

But for thy repentance will I deliver them; and they shall come forth with power, and with gladness of heart, and with much substance.

"For every lawyer leaving the Army, they are replacing him with four of these things and one set of American Jurisprudence."

Res Judicata

By ILO ORLEANS
Member of the New York City Bar

(*Italics represent emphasis supplied by counsel*)

When lawyer's wrath
Has been provoked,
The higher Court
Is oft invoked,
That error of
The Court below
Be crushed 'neath stern
Appellate blow.
"A plague upon
The Special* Term!"
Cries out, at length
The *turning worm.*
And fortified
With case and text,
He moves, triumphant,
Unperplexed.
Assured, Appellate
Erudition
Will teach that Special*
Term, contrition.
The studied brief
Is wrought with zeal.
He cannot fail
In this appeal!

* * * *

The great day comes
The earnest plea
Stirs buoyant hope
Of victory.
The sympathetic
Inquiries
The judges made,
Stir sense of ease.
Content, the lawyer
Then relaxes—
His optimism
Rises—waxes.

* * * *

A *dozen* days
Pass trippingly.
Behold!—*with great*
Alacrity,
The court, its rescript
Has decreed!
Appellate counsel
Leap to read.....

* * * *

Alas! the effort,
Study, thought!
"*Affirmed,* with costs"—
'Twas all for naught!
What lawyer has
Not fumed or squirmed
To find that *erring*
Judge affirmed.

* * * *

Of noisome words
These hold dominion:
"*Affirmed, with costs*
Without opinion!"

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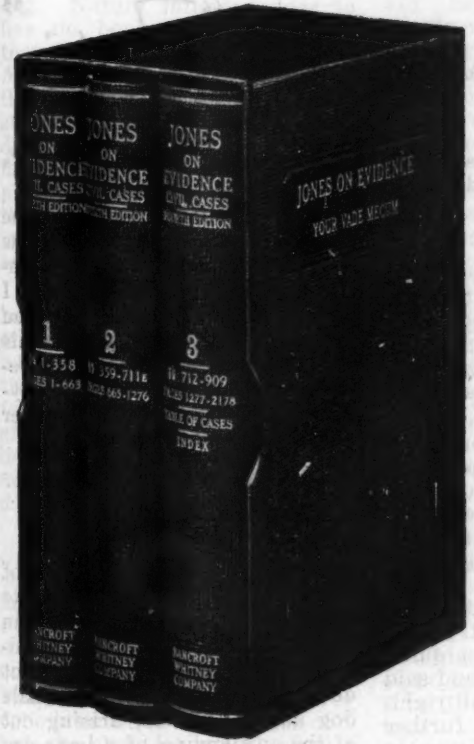
* also, Trial

Jones on Evidence



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Re: ONE SPITZ DOG "Tootsie"

Contributed by
SAMUEL F. HOLLINS
Fresno, California

THE following letters ended all claims for the death of a dog.

"Dear Sir:

My clients have placed in my hands for adjustment their claim against you for negligence in respect to the treatment of their thoroughbred Spitz female dog, named Tootsie, arising out of swallowing a bone.

According to the information which I have, on August 16th, 1932, about one-half hour after the dog swallowed a bone, it was brought into your office and you attempted to push the bone down the dog's throat. About two hours later in the day, you swabbed the dog's throat, directed that the dog be kept quiet, and gave the dog a pill and said that the dog would be all right. I understand that the further treatment of the dog was in your hands. However, it appears that you and your assistant should have removed the bone, and if you had done this the dog would not have died. Because of your failure to remove the bone, it lodged near the dog's heart and caused an abscess to form around the dog's heart and gangrene to set in.

Before instituting suit for the value of this dog against you, as a matter of courtesy I recommended to my clients that I write you this letter to give you an opportunity to settle this claim amicably, and I am, therefore, leaving this matter in abeyance until Thursday, September 1st."

REPLY

"Dear Sir:

In re: Tootsie

This will answer your letter of August 27th, 1932, addressed to my dog doctor client, wherein you bring up the claim for negligence in respect to the treatment of a thoroughbred Spitz female dog named Tootsie, arising out of the swallowing of a bone-dry bone.

You recite in your letter that Tootsie was taken to the dog Hospital August 16th for treatment after the swallowing of a bone and that the bone instead of being pulled out was pushed down and subsequently the

dog's throat was swabbed out and the dog was given a pili.

Perhaps you have never studied the physiology of the dog. Nature intended dogs to live on bones and anticipated that dogs might swallow bones. Accordingly nature provided that the digestive fluids in the stomach of dogs would and they do dissolve bones in approximately eight hours. Hence the proper treatment was to push the bone down in the stomach letting nature take its course and the bone would be dissolved.

You now claim that we should have removed the dog's bone, otherwise Tootsie would not have died. It is our contention that the treatment prescribed for Tootsie was the standard and accepted treatment established the world over by good dog doctors for the treatment of dogs who have swallowed bones.

We now understand that your clients took Tootsie away from us, took her to another doctor and this doctor instead of letting nature take its course, operated on Tootsie and took the bone out of the esophagus. This, I am informed, is never done because it necessitates cutting the shoulder bones and is a very dangerous operation from which few Tootsies ever recover.

Then too Tootsie weighed 40 pounds. A good thoroughbred Spitz should only weigh 20 pounds. Tootsie was way over weight and she might have died from fatty degeneration of the heart. Assuming, which we do not, that my client was guilty of any negligence, surely your clients were guilty of contributory negligence in feeding Tootsie too many bones. This should bar your recovery.

Before filing suit, I suggest that you consult some good medical treatises on the proper treatment for dogs who have swallowed bones. If you do this I am sure you will come to the conclusion that my client is not liable and that Tootsie died from fatty degeneration of the heart resulting from over feeding or from the effects of an unnecessary operation in the attempts to remove a bone which nature in time would have dissolved.

You tell me that you want $500.00 to settle this case. We can buy a female Spitz for $5.00 with better body lines than Tootsie. I have examined the American Mortality Tables for Spitz dogs and find that the average life for the Spitz female dog weighing 40 pounds or over is eight and a half years. Therefore, Tootsie was due to die anyway.

In closing, I wish to reiterate that your clients were negligent in giving Tootsie too many bones; that Tootsie should have dieted; she should have eaten yeast cakes; she ate too many bones."

AN EXPLOSION IN RENT CONTROL

BY ROLAND F. NORTH
District Attorney, Chippewa Falls, Wisconsin

IN *Case & Comment* May-June 1946, Vol. 51 No. 3, you have advertisement "THE BLESSING OF AMERICA, A GOVERNMENT OF LAW AND NOT OF MEN." That is what America should be, but it is far from it. Vide: Sec. 8 O.P.A. Housing Regulations "Sec. 8. Inspection. Any person who rents or offers for rent or acts as a broker or agent for the rental of housing accommodations and any tenant shall permit such inspection of the accommodations by the Administrator as he may, from time to time, require."

That happened in America. It is not merely a rule promulgated by a bureau; the rule is copied verbatim from the Act of Congress. No writ in the hands of an officer, issued by a Court upon oath or upon probable cause; just as the Administrator may from time to time, require. What becomes of the privacy and sanctity of a home? What of "every man's house is his castle?" What becomes of Art. IV of the first ten Amendments to the Const. of The United States?

During the War, we would not do anything to hinder the winning of the war. We were not at war when the O.P.A. was revived. I am a renter; the Area Rent Director is a private citizen. Neither he, nor any other person, will enter my home against my wishes, unless armed with a proper writ, and live; my answer to such an invasion is a 30.30 deer rifle and I am considered a good shot.

As district attorney of Chippewa County, I have written the O.P.A. Administrator at Washington, D.C. that homicide committed against him or any of his agents under such circumstances, will be considered justifiable in this County; and that on complaint of any such attempted invasion, I will prosecute criminally, the Administrator or any of his agents.

I have written the Congressman of this Dist. and one of the U. S. Senators, that should such

attempt be made on my home, I would shoot, shoot to kill, and would kill, the Administrator or any of his agents.

In prosecuting a proper case of such an attempt above mentioned, I will do so, in spite of any and every restraining order of any Court, completely regardless of any consequences to me.

That is the way to preserve the BLESSING OF AMERICA, of which you speak in your advertisement, in such a set of circumstances. My oath of office is registered in heaven; it was so intended; I may have a chance to read it there. So mote it be.

Matter of Depth

The youthful mountaineer had just been brought into court and sentenced for breach of the peace. Testimony showed that he had done some feuding, featured by his adept handling of a knife.

After the trial, his grizzled old father stood with a group of cronies on the courthouse lawn.

"I swear," he said, "I don't know whar that boy gits all his meanness. Now, you take me—I never stuck a knife *deep* in nobody."

—*Wall Street Journal.*

Maiden Ladies, Beware!

A law against obtaining husbands under false pretenses was passed by the English Parliament in 1770.

"That all women of whatever age, rank, profession, or degree, who shall, after this act, impose upon, or seduce, and betray into matrimony any of His Majesty's male subjects, by virtue of scents, paints, cosmetic washes, artificial teeth, false hair, Spanish wool, iron stays, bolstered hips, or high-heeled shoes; shall incur the penalty of the law now in force against witchcraft and like misdemeanors, and the marriage under such circumstances shall be null and void."

—*Lawyer's Title News.*

Painful

Both girls were injured. Miss ——— was cut about the face and hands and Miss ——— in the back seat.

—*Raymond (Wash.) Herald.*

The Right to Sue the United States Under the Tort Claim Act

By JOSEPH T. KARCHER

Condensed from New Jersey Law Journal
September 12, 1946

FOR the first time in the history of the Republic, the United States of America can be sued for any injury or damage "caused by the negligent or wrongful act or omission of any employee . . . acting within the scope of his office or employment", by any of its citizens, without the "consent of the Sovereign". That is—as soon as the newly adopted law providing for reorganizing the machinery of Congress comes into actual operation. It is now PL 601 of the 79th Congress and is known as the "Legislative Reorganization Act of 1946." Title IV is known as the "Federal Tort Claim Act."

One of the basic principles of law has always been that the Government or Sovereign is supreme and therefore cannot be sued by any of its citizens, without its consent which is rarely if ever given. Consequently if an individual was injured, or his property damaged by the negligence of a government employee in the operation of the government's business he could not sue for his damages.

For such a citizen practically his only hope of redress was to get his Congressman or some Member of Congress to introduce a special act in Congress appropriating a fixed sum of money for his relief and authorizing that this money be paid over to the injured party to compensate him for his losses. These bills are known as "private claims bills" and this practice has been going on for years. Hundreds of such bills were introduced in Congress yearly and quite a few of them were passed —but only about 20% in proportion to the number introduced. Still these have meant an annual expenditure for the government running into several millions of dollars.

In recent years with the war in full swing and the United States Government taking a hand in an ever widening variety of enterprises the number of claims have naturally increased. Some elev-

en and one half million men and women in the armed forces and another two and one half million civilian representatives of the government have stepped up the total percentage of claims against the United States government and likewise the number of bills for relief introduced into Congress. So much so that it was beginning to take up too much of the time of the Congress.

What Congress did was to pass a law which in addition to innumerable other provisions has the effect of the United States Government "consenting to be sued" for personal injury or property damage claims allegedly due to the negligence of the United States government or its employees. All such claims arising on and after January 1st, 1945 are subject to this new legislation.

Congress of course has been leading up to this action for many years. Almost a hundred years ago it was recognized that in contract cases where actual fraud on the part of the Government was alleged, the citizen was entitled to redress. Later this was extended to other phases of contract claims. Abuse and infringement of patents and claims in admiralty involving shipping also have long been recognized by the Government. As to these types of claims and all others for which a remedy presently exists, the new law does not attempt to legislate. They are to remain the same. Neither does the new law permit suits on claims arising out of actions by the Treasury Department in freezing the funds of foreign nationals; loss, miscarriage or transmission of postal matters; imposition or establishment of quarantine; injuries to person or property while going through the Panama Canal or Canal Zone waters; fiscal operations of the Treasury or regulations of monetary system; combatant activities of armed forces during war; claims arising in a foreign Country or under the Tennessee Valley Authority.

Likewise any claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights are all barred from the provisions of the new act, as well as claims arising through blacklisting firms allegedly doing business which directly or indirectly benefited our enemies or other proceedings taken under our "Trading with the Enemy Act".

Common law torts of course include a very wide field. They are what actually keeps the bulk of our civil courts busy the year round. Under the terms of the Act the principal tort for which the government will be subjected to suit is that of "negligence". Negligence itself and particularly negligence arising from the

operation of motor vehicles is admittedly the principle tort being litigated in all of our courts today. In the case of the government the existing law of negligence will now apply not only to all vehicles operated by the Army and Navy but to those operated by all other government departments and agencies as well. Negligence in the maintenance, operation, control of highways, bridges and public lands, buildings and structures of all kinds will also be included.

The new procedure is to be very simple. If the claim is under $1000 the agency or Department where the claim arises is to have the authority to negotiate and make the settlement. If the claim is over $1000 the claimant must institute his suit against the United States in one of the U. S. District Courts and serve his summons and complaint on the local United States Attorney. The trial of the claim is to be before the U. S. District Court Judge alone without a

"When you cross-examine her, don't forget to ask her where she got that adorable hat!"

jury and the usual strict rules of evidence are to apply. Either party who feels aggrieved at the Court's decision may appeal in accordance with existing appellate procedure. Legal fees will be limited to 10% of the award before the agencies, 20% before the Courts.

The statute of limitations for suits on these claims is one year from the date of occurrence, or one year from the date of the enactment of this act, whichever is later. In cases of claims under $1000 submitted to a Federal Agency for payment the law provides an extension of the statute of limitation for 6 months from the date the agency notifies the claimant of the disposition of the claim, as well as 6 months from the date the claimant withdraws the claim from the consideration of such Federal Agency. A claimant may make such withdrawal on 15 days notice.

Something in the nature of a forerunner of this liberality in the handling of claims against the government was the Foreign Claims Act adopted by Congress early in 1942 shortly after we entered the war. Under this act claims could be made against the United States Government up to $5000 for damages inflicted on foreign life or property. There were several limitations however, the principal one being that the damages had to arise out of non-combat activities of our armed forces, while either on or off duty. Under this act the U. S. Government has already paid out over $5,000,000 to European claimants for damages suffered or alleged to have been suffered as a result of the acts of our soldiers overseas.

In the long run this new act of Congress should be worth what it costs the government in claims paid. The various agencies and departments will no doubt adopt strict and rigid rules and formulae for the allowance of any claims presented. The judges of the various U. S. District Courts, experienced in the daily trial of negligence cases, can be relied upon to see that no awards are made against the U. S. Government unless they meet the well established requirements of law.

Meanwhile the members of Congress will have more time available to concentrate on the problems affecting the welfare of the whole country while the Agencies and the Courts take care of the problems of the individual claimants.

Had a Bad "Spell"

First I got tonsillitis, followed with appendicitis and pneumonia. After that I got erysipelas with hemochromatosis. Following that I got poliomyelitis, and finally ended up with neuritis. Then they gave me hypodermics and inoculations. Boy, I thought I'd never pull through that spelling test!

OPERA BOUFFE

Final Scene in Alienation of Affections Suit

Extracts from Fry v. Lebold, Ohio App. 30 Ohio Law Abstract 384

MONTGOMERY, J.: "With painstaking care we have read the scene presented, consisting of nine hundred and thirty-four pages. We use this term in view of the definition given by Webster as an 'accompanied dramatic recitative interspersed with passages of melody.' And we use it advisedly, since the authors of the production submitted for our consideration seem to have acted on the theory that,

'All the world's a stage,
And all the men and women merely players;
They have their exits and their entrances;
And one man in his time plays many parts.'

Assignments of error go to alleged misconduct of counsel. There are but few pages in this record free from reports of altercation. It would appear that two, three and four lawyers were talking more or less continually, injecting comments, making facetious remarks, paying but little attention to the rulings of the trial judge.

Certainly this turning of a lawsuit into an opera bouffe is to be criticized severely, but, in the absence of a showing that the rights of a litigant were affected adversely, we are not disposed to disturb the judgment.

In view of our characterization of this record, this conduct of counsel deserves some further comment.

One of the counsel for defendants played many parts. He bewailed his fate in tragic manner not unworthy of King Lear. Imitating Mazeppa, he lashed his soul naked to the wild horse of his fervid imagination. In the final act, he interspersed the melody, and assumed the rule of leading tenor in light opera, singing to the jury and to the spectators.

Another, laying aside for the nonce the duties imposed upon a statesman, exhibited histrionic ability of no mean order.

Counsel for appellant, presented facetiously as the Mills brothers, took the part of the chorus in a Greek drama, and, beholding what passed in the acts of the tragedy, expressed vociferously the sentiments evoked by the passing events.

It is true that tragedy and comedy were somewhat confused and at times all the leading actors sought a hearing simultaneously.

The whole performance might well rival Mr. Eugene O'Neill's 'Strange Interlude,' which for weirdness in conception and duration of execution amazed all who saw and heard it.

The play is ended. The actors who failed to receive the curtain calls seek a return engagement. We are not disposed to book it. The judgment may be affirmed."

"Judge Trimble just hates formality!"

A The ANNOTATION, in which the leading point in a case is taken as the subject for an exhaustive analysis of all cases on the point.

L The statement of LAW made by the editor only after all cases have been read and compared and all possible distinctions pointed out.

R The REPORTED cases in American Law Reports are the cases from all jurisdictions which are most valuable everywhere.

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